Moran Printing, Inc. *and* International Brotherhood of Teamsters, Local Union No. 5. Case 15–CA–13705

December 30, 1999

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 22, 1999, Administrative Law Judge Howard I. Grossman issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

On December 29, 1995, the Respondent unlawfully laid off employees L. C. Gray and Ripley Dixon in violation of Section 8(a)(5) and (1) of the Act. In this proceeding, the judge found that neither discriminatee was entitled to any backpay, and he dismissed the compliance specification. Regarding Dixon, the judge discredited his testimony and found that Dixon did not make a diligent search for work prior to his interim employment with Hackbarth Delivery Service (Hackbarth). The judge further found that Dixon's interim job with Hackbarth was not substantially equivalent to his former position with the Respondent. The General Counsel excepts only to the above findings pertaining to Dixon. He argues that Dixon is entitled to backpay for the entire backpay period or, alternately, at least for the calendar quarters coinciding with his interim employment with Hackbarth.

1. We agree with the judge that the credited evidence shows that Dixon did not exercise reasonable diligence in his job search from the time of his layoff to the commencement of his employment at Hackbarth. Dixon, who was called as a witness by the Respondent, signed the hiring hall out-of-work book maintained by the Teamsters Union Local 5 only twice after his discharge—in January and on May 13, 1996.[2] Dixon also procured the signature of the Union's business manager on an unemployment benefits form in order to obtain such benefits until late June 1996.[3] The record shows that from late June 1996 until his Hackbarth employment started on September 4, 1997, Dixon's search for work was at most sporadic. The judge discredited his testimony regarding efforts to obtain work because of the many inconsistencies among the written list of employers that he had submitted to the Region's compliance officer, his deposition testimony in related court proceedings, and his testimony at the compliance hearing.[4] Therefore, we find that the record supports the judge's conclusion that Dixon did not engage in a reasonably diligent job search prior to his interim employment at Hackbarth.[5]

2. We disagree, however, with the judge's finding that Dixon's acceptance of the position at Hackbarth violated his obligation to seek substantially equivalent employment and therefore constituted insufficient mitigation of damages. The record establishes that Dixon's primary work before his layoff by the Respondent was driving a delivery truck and that his position at Hackbarth primarily entailed driving a delivery car. At the time of his unlawful layoff, his hourly rate was $9.47 per hour, while Dixon's uncontroverted testimony reflects that his starting pay rate at Hackbarth was $7 per hour.

A discriminatee is entitled to backpay if he makes a reasonably diligent effort to obtain substantially equivalent employment. See *United Aircraft Corp.*, 204 NLRB 1068, 1068–1069 (1973). In a backpay proceeding, the burden is on the respondent employer seeking to mitigate its liability to establish that the discriminatee willfully incurred a loss of interim earnings by a "clearly unjustifiable refusal to take desirable new employment," or that the discriminatee could have done better than he did in taking particular interim employment. *E & L Plastics Corp.*, supra, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). "Doubts as to when a claim-

[1] The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The record indicates that Dixon's failure to sign the out-of-work book each month apparently meant that his name dropped further down the referral list each month from his initial signing in January until his second signing in May. Dixon testified that he was not told that he needed to sign the book every month to remain near the top of the referral list. The Union's business manager testified, on the other hand, that the need to sign the book at the beginning of each month in order to remain current on the list was "common knowledge" among those who used the hiring hall.

[3] The Union's business manager testified that he signed the unemployment benefit forms so that Dixon could receive benefits, not as an acknowledgment that Dixon was seeking work outside the hiring hall.

[4] Although he had submitted a list of many employers where he had purportedly searched for work in this period, on the witness stand Dixon could recall only two employers with whom he had applied for work from July 1996 to September 1997, and neither of these two employers was on the list submitted previously to the compliance officer.

[5] We do not adopt the judge's finding that Dixon's signings of the out-of-work book "do not constitute a search for work." Thus, contrary to the judge, Dixon did not "delay in seeking employment" until September 1996. While we agree with the General Counsel that the judge erred on this point, we nonetheless do not find that Dixon's signing of the book alone constitutes a reasonably diligent search for work. Registration with a hiring hall, like an employment service, "does not establish the reasonableness of an employee's search for interim employment"; rather, "it is a factor to be weighed in determining whether the search has been reasonably diligent." Cf. *Black Magic Resources,* 317 NLRB 721 fn. 3 (1995) (state employment services); and *E & L Plastics Corp*., 314 NLRB 1056, 1057 (1994) (same).

ant is justified in lowering his sights should be resolved 'in favor of the innocent discriminatee.''' *United Aircraft Corp*., supra at 1068 (citing *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972)).

The Respondent has not sustained its burden of showing that Dixon failed to make a reasonably diligent effort to obtain substantially equivalent employment at Hackbarth. The record fails to show that Dixon's delivery work at Moran and Hackbarth were significantly different, either in terms of pay rate[6] or the nature of the work. See *Rainbow Coaches*, 280 NLRB 166, 182 (1986), enfd. 628 F.2d 1357 (9th Cir. 1980) (quoting *McCann Steel Co. v. NLRB*, 570 F.2d 652, 655 (6th Cir. 1978)).

Thus, we shall award backpay to Dixon for the third and fourth quarters of 1997 and the first and second quarters of 1998, in accordance with the amount described in the compliance specification, but with one exception. As previously indicated, we find that Dixon is only entitled to backpay for approximately the last 4 weeks of the third quarter of 1997. Therefore, we have recalculated his gross and net backpay for this quarter and find that Dixon is entitled to $1,666.76 net backpay for this quarter.[7] Accordingly, the total amount of net backpay due Dixon for all four calendar quarters is $9,313.40.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Moran Printing, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall pay Ripley Dixon the sum of $9,313.40, plus interest, less the tax withholdings required by Federal and state law computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] The judge found that Dixon made "less than one-half" his former salary while working at Hackbarth during the fourth quarter of 1997 and "a little more than half in the next quarter." This finding is inaccurate. According to the compliance specification, during the fourth quarter of 1997, Dixon's interim earnings at Hackbarth were $2,640.76, and his total regular pay at the Respondent would have been $4,924.40. In the first quarter of 1998, Dixon's interim earnings at Hackbarth rose to $3,270.76, while his pay at the Respondent would have remained the same as the preceding quarter. In addition, Dixon gave uncontroverted testimony that he worked less than full time when he first began to work at Hackbarth in September 1997. Therefore, Dixon's lesser earnings at Hackbarth in the fourth quarter of 1997 are likely partially attributable to a difference in the number of hours worked at his Hackbarth position and the number of hours he would have worked at his former job, not a large difference in pay rates as the judge apparently assumed.

[7] For the third quarter of 1997, we first divided $7,464.44 (the total gross backpay listed for that quarter by the compliance specification) by 13 (the number of weeks in the quarter) to obtain his average weekly earnings of $574.19. Then we multiplied the average weekly earnings figure by 4 (the number of weeks Dixon worked at Hackbarth during this quarter) to obtain his revised gross backpay for this quarter, $2,296.76. Finally, we subtracted $630 (the amount of his interim earnings at Hackbarth listed for that quarter by the compliance specification) from the revised gross backpay figure to obtain his revised net backpay of $1,666.76.

[8] This amount represents:

Third Quarter 1997	$1,666.76
Fourth Quarter 1997	3,308.48
First Quarter 1998	3,814.88
Second Quarter 1998	523.28
TOTAL	**$**9,313.40

Leslie Troope, Esq., for the General Counsel.
Murphy J. Foster III and *Leslie Shirley, Esqs*. (*Brezeale, Sachse & Wilson, LLP*), for the Respondent.
Randall G. Wells, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN**,** Administrative Law Judge**.** On April 2, 1997, the Board issued an unpublished order in the case captioned above, which adopted the finding of an administrative law judge that Moran Printing, Inc. (Respondent or the Company) had committed various unfair labor practices, including the unlawful layoff of employees L. C. Gray and Ripley Dixon.[1] On September 18, 1997, the Court of Appeals for the Fifth Circuit entered its judgment enforcing the Board's Order, inter alia requiring Respondent to offer Gray and Dixon reinstatement to their former positions, and to make them whole for any loss of earnings they may have suffered by reason of their unlawful layoffs.[2] On August 7, 1998, the Regional Director for Region 15 issued a compliance specification and notice of hearing alleging that a controversy existed concerning the amount of backpay due under the Board's Order[3]

A hearing was held before me on the allegations of the compliance specification in New Orleans, Louisiana, on January 28, 1999. Thereafter, the General Counsel, Respondent, and the Charging Party filed posthearing briefs, and Respondent filed a posthearing reply brief. The essential issue is whether Gray and Dixon engaged in a diligent search for interim employment and thereby mitigated damages. On all the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

A. The General Counsel's Case

The parties stipulated to the accuracy of the calculations in the backpay specifications, the tax statements of Gray and Dixon, and the expired collective-bargaining agreement.[4] The General Counsel then rested.

B. Respondent's Case

1. L. C. Gray

Prior to employment at Respondent's facility, Gray worked as a cook, a busboy, and a bartender. At Respondent's, he was a shipping clerk and a porter (cleaning up), unloading machines in the foundry, and loading trucks.

a. Gray's testimony

Gray was laid off on December 29, 1995, and was reinstated by Respondent on April 6, 1998. He testified that he had no interim earnings during this period, except for a "few dollars" he made mowing lawns for friends. Gray asserted that he

[1] G.C. Exh. 1(a).
[2] G.C. Exh. 1(d).
[3] G.C. Exh. 1(e).
[4] G.C. Exhs. 2, 3, and 4.

sought employment at four places, although he had no reason to believe that they were hiring. The four places were True Value Hardware Store, Sash & Door Co., Walker's Filling Station, and a lawyer's office. In his pretrial statement Gray said that the last place was a doctor's office, not a lawyer's office. Asked whether the first place where he sought work was True Value Hardware Store, Gray could not recall. However, he and Dixon, had filed a complaint against Respondent in Federal court, and his deposition was taken in connection with that case about 2 weeks before his testimony in the unfair labor practice case. He was asked during the deposition whether he first sought work at True Value Hardware Store and replied that it "could have been." Gray testified that his visit to the hardware store took place in the summer of 1996. He also testified that his visit to "the lawyer's office" took place in early 1977, and "could have been" his last application for work.

b. The union hiring hall

Gray and Dixon were members of the Union, which maintained a hiring hall. Business Manager Byron Partin submitted pages from the out-of-work book which shows Gray's signature on May 13, 1996.[5] Partin testified that this was the entirety of the evidence which he had that Gray sought work. Gray was asked why he signed the book only once, and replied that he did not know. He agreed that Partin told him in January 1996 that he had to sign the out-of-work book if he wanted work. However, Gray did not sign the book until May 13, 1996. Dixon signed in January 1996, and again on May 13.

Business Manager Partin testified that the Union has bargaining units with warehousemen, the type of work which Gray performed. Partin stated that an applicant's signature in the book remained "active" for 1 year. However, in referring applicants for jobs, the Union started with the most recent applicants during the month. Accordingly, many applicants signed the out-of-work book every month, and thus increased the likelihood that they would be hired. There was no formal notice of this practice at the union hall. However, Partin testified that the out-of-work book was "common knowledge among the membership." Gray testified that, although Partin told him to sign the book, the business manager did not explain how it worked. Partin submitted copies of the out-of-work book to the Board on May 19, 1997. In a cover letter accompanying these documents, Partin stated that Gray and Dixon were "actively seeking employment."[6] On cross-examination, Partin testified that this letter was true and correct. Partin also signed Louisiana "Record of Work Search/Union Contract" documents submitted to him by Gray and Dixon.[7] He testified that he did not intend to convey to the Department of Labor that they were actually seeking employment. This was simply a "requirement" of the department. Although Gray and Dixon remarked to him that there were places where they had sought work, they never asked him to find jobs for them.

c. The unemployment insurance benefits

Louisiana requires that an applicant for unemployment insurance benefits must engage in a search for work, and provide a record of that search. The applicant must list one employer contact per week and the date of the visit on a "Record of Work Search/Union Contact." In the alternative, a union member in good standing may satisfy the work search requirement by reporting to the union hall at least once each week and securing a union officer's signature on the "Record of Work Search/Union Contact."[8]

Gray (and Dixon) applied for and received unemployment insurance benefits. Gray testified that he received a book recording his search for work, and that he requested people whom he asked for work to sign and date this book. He was shown his "Record of Work Search/Union Contact." This document contains one entry prior to Gray's discharge on December 29, 1995, 16 entries within the first 25 weeks of 1996, and none thereafter.[9] The entries consist of nine purported signatures of individuals, and eight names of companies. Gray was asked whether any of the writings on this document were his, and replied that he signed the third and fourth entries (the names "Robert G" and "Jamal Davis"). Gray asserted that the remaining signatures were made by people to whom he applied for work, or by individuals at the union hall. The only employer listed on this form which coincides with Gray's testimony is the True Value Hardware Store.[10] The nine individual signatures were not identified except for the last three, purportedly signed by Business Manager Byron Keith Partin. Partin agreed that the 15th and 16th signatures were his, but denied that he signed the last one. It is different in appearance from the prior two signatures. (One of Partin's signatures was dated May 13, 1996, the only date Gray signed the union out-of-work book.) Partin testified that he signed the "Record of Work Search" in order to allow Gray to collect benefits, not as an acknowledgment that Gray was seeking work.

d. The classified newspaper ads

Respondent sought to introduce various documents as evidence of newspaper advertisements of the availability of jobs, and counsel for the General Counsel objected. For the reasons give below I accept this evidence.

Respondent submitted two classes of documents: (1) purported copies of newspaper advertisements of the availability of various jobs and (2) various affidavits to establish the authenticity of these documents.

The first category contains documents which, Respondent contends, are copies of a Baton Rouge newspaper, *The Advocate*, from January 1996 through October 1997. Some of these documents contain the name of the newspaper and a date, while others do not. The newspaper's name and date appear on January 7, April 7, and October 6, 1996, and January 5, April 6, July 6, and October 5, 1997, with many purported pages from the newspaper not containing the newspaper's name or a date. These pages are printed in a format and with type appearing to be identical to that used in the dated documents.

The second category of documents contains an affidavit from the library director of *The Advocate*, dated January 27, 1999, stating that printed copies of newspapers are maintained for one year, and thereafter on microfiche at the East Baton Rouge Parish Library (R. Exh. 40). The second affidavit is from a certified librarian from the East Baton Rouge Parish Library stating that the attached reproductions are copies of classified sections from *The Advocate* from January 7, 1996, through October 5, 1997 (R. Exh. 5). The third affidavit is similar to

[5] G.C. Exh. 7

[6] G.C. Exh. 7.

[7] See infra, sec. c.

[8] G.C. Exhs. 12, pp. 36 and 41; 13, pp. 36 and 41.

[9] G.C. Exh. 12, p. 41.

[10] The remaining stores are Home Depot, Wallace Offset, Blue Cross, Lowes, and B. R. Door Supply.

the preceding one, and is signed by a certified librarian who is also a member of Respondent's law firm (R. Exh. 6).

Counsel for the General counsel objected to the first category of documents on the ground that they did not contain the name of the newspaper and were not dated. This objection was then withdrawn as to such documents that contained the name and date. Counsel objected to the affidavits authenticating these documents on the ground that they were hearsay.

Section 902(6) of the Federal Rules of Evidence states that extrinsic evidence of admissibility is not required as to "printed material purporting to be newspapers or periodicals." The courts have cited this section of the Federal Rules as establishing that newspapers or periodicals are self-authenticating.[11]

Counsel for the General Counsel questions the identity of the documents, and argues that absent evidence other than affidavits to authenticate these documents, there is only hearsay evidence that they are in fact newspapers. They are merely "pages," with the exception of those few documents which contain the name of the newspaper and its date.

With respect to the absence of authenticating witnesses, Rule 803 of the Federal Rules of Evidence lists evidence not excluded by the hearsay rule "even though the declarant is available as a witness." Included in such evidence are statements not specifically covered by the hearsay exceptions which have "equivalent circumstantial guarantees of trustworthiness" (Rule 803(24)). In the case at bar, the undated documents have a type and format similar to those which are named and dated and which, the General Counsel concedes, are copies of newspapers. I conclude that this similarity constitutes circumstantial evidence that all the copies came from the same newspaper. In addition, the librarians' affidavits constitute further circumstantial evidence of trustworthiness under Rule 803. Accordingly, I find that the documents were newspapers or excerpts therefrom, and they and the affidavits are admitted.[12]

The positions advertised are numerous and include jobs of the type Gray had held. He testified that he read the ads in the paper, but not "all the time." He could not recall the number of times he did so. He did not know that the ads are divided into various classifications of employees, and paid "no attention" to these classifications. Gray testified that he never called any of the ads asking for "General Labor" nor, indeed, any other kind of ad.

e. The medical problems of Gray's wife, and his application for retirement benefits

Gray testified that his wife had a "light stroke" in February, and that he had been "taking care of her" since that time, with the assistance of his daughter. He prepares food, cleans the house, and runs errands. He testified about the extent to which this affected his search for work. The transcript reads:

> Q. [W]ould it be correct to say that the only work that you have searched for since your wife's stroke . . . have been for part-time jobs?
>
> A. Right. I've been looking for work, but nothing come my way.
>
> Q. The reason why they were part-time jobs is because you needed time to take care of your wife, too. Right?
>
> A. Not necessarily for part-time. I want to work.
>
> Q. I thought you told me that the work that you've looked for since she was paralyzed was part-time?
>
> A. I was looking for work.

On July 3, Gray applied for and later received retirement benefits under the Social Security Act. He testified that, since his retirement, he had been "mostly" looking for part-time work. During Ripley Dixon's deposition in the Federal proceeding which he and Gray filed against Respondent, Dixon testified that Gray never told him about any places where Gray had applied for work. Dixon changed this testimony during the unfair labor practice hearing.

f. Gray's asserted statement about his search for work

As set forth above, Business Manager Partin testified that Gray never asked the business manager to find work for him. Respondent also sought to elicit from Partin testimony that Gray did say something about his search for work. Counsel for the General Counsel objected on the ground that any such statement was made during settlement discussions, and was inadmissible. I agreed to hear the testimony, and thereafter rule on its admissibility.

The time that the settlement negotiations took place is not entirely clear. The General Counsel argued that they took place after Gray had been reinstated, and involved Respondent's attempt to force a settlement on the backpay issue. Partin asserted that other issues, such as "effects bargaining" were discussed, but agreed that the amount of Gray's and Dixon's backpay were also issues. The question posed to Partin was whether Gray had ever said anything to indicate that he was not seeking to be employed during "the relevant period." Partin's answer was as follows:

> Mr. Gray had told me that he did not want to pursue this any further. I think the backpay for him at the time was a lump sum of $34,000. He had told me that . . . he did not want to go back to work at Moran. He wanted to go home and take care of his wife. She was sick.

Respondent argues that this testimony is not barred by Rule 408 of the Federal Rules of Evidence.[13] Respondent cites *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983), to support its argument that Rule 408 does not require exclusion of this testimony. More apposite is *DiMucci Construction Co. v. NLRB* 24 F.3d 949, 950 (7th Cir. 1994), where the respondents made admissions concerning one of the issues in the case.

[11] *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988); *Price v. Rochford*, 947 F.2d 829 (7th Cir. 1991); *Orloff v. Cleland*, 708 F.2d 372 (9th Cir. 1983); and *Shell Oil Co. v. Kleppe*, 426 F.Supp. 894 (D. Col. 1977), affd. sub nom. *Shell Oil Co. v. Andrus*, 591 F.2d 597 (10th Cir. 1979).

[12] R. Exh. 3. Also R. Exhs. 4, 5, and 6.

[13] Rule 408 reads:

> Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

I conclude that Partin's testimony is admissible, but question its relevance. Gray did accept reinstatement.[14] His asserted comment to Partin does not establish that, prior thereto, he did or did not make a diligent search for work.

2. Ripley Dixon

a. Dixon's asserted search for work

Dixon had worked approximately 25 years for Respondent. Prior to his layoff in December 1995 he worked as a truckdriver, a janitor, a shipping clerk, and a porter. The latter job consisted of setting up trash boxes, sweeping, obtaining "solutions," and washing presses. He was classified as a truckdriver at the time of his layoff.

Dixon testified that he did not "choose" to do porter work, and that the only job he was seeking after his layoff by Respondent on December 29, 1995, was a driver's job. During his deposition in the federal case which he and Gray filed against Respondent, Dixon could not remember the name of any place where he filed an application for employment. In his testimony at the unfair labor practice hearing 2 weeks later, Dixon testified that he filed applications at "Herlis Trailer" and "Baton Rouge J.C.'s."

Dixon had submitted to the Region in 1997 a purported "Work Search" record copied by his wife from a scratch pad which Dixon no longer had. He testified that he reviewed this record and that it was accurate. There are numerous entries on this documents,[15] but neither "Herlis Trailer" nor "Baton Rouge J.C.'s" appears on it. The first place is "Cintas" in September 1996. Dixon testified that this was the first place where he sought work. During his deposition, Dixon could remember only "Cintas," "Herlis Trailer, "Ready Portion," and "Louisiana Lottery" as places where he looked for work. During his deposition he added "someplace on Airline Highway near Sam's." Dixon could not remember any other places in his testimony at the hearing. He asserted that he only sought a job as a driver. Jobs for drivers were listed in the Baton Rouge *Advocate*. Dixon stated that he read the classified section, and claimed that he made some calls. However, he could not remember any names.

Dixon was asked whether he had any documents other than his own record to support his asserted search for work. He referred to his "unemployment book," by which he meant his Louisiana "Record of Work Search/Union Contact." This document shows one entry for each of the first 25 weeks of 1996, and none thereafter. Each signature is that of Union Business Manager Hardin, or his secretary. No company is listed.[16]

Dixon's purported work record shows that he sought work in August 1997 at "Hackbarth Delivery Service," and that he began working there in September 1997. Dixon testified that this was true.

b. Dixon's workers' compensation claim

Dixon was involved in a work-related accident in February 1993. He suffered a shoulder injury, and underwent surgery about 7 months later. After 11 months of absence, he was released to return to work, and did so. Dixon testified that he received workers' compensation benefits during this period. After his return to work, he was able to function without any difficulty, according to his testimony. He asserted that he engaged in shipping, driving, and porter work. In addition, he had to off-load manually skids of paper containing 500 reams.

Subsequent to Dixon's layoff by Respondent, he filed another workers' compensation claim based on the same injury. Thereafter, Dixon and Respondent filed a joint petition to compromise this claim. The petition, signed by Dixon and Respondent's representative, states that a "real dispute" existed as to the nature, extent, and duration of Dixon's disability. Dixon claimed, according to the petition, that he suffered from either temporary or permanent total disability, or permanent, partial disability. He testified at the hearing that he did not read this in the petition—he did not have his glasses.. The petition shows that Respondent had already paid over $36,000 in medical expenses and over $15,000 to Dixon.[17]

The joint petition was approved on February 12, 1997, and Dixon received an award of $1500. Later, as shown above, the Court of Appeals for the Fifth Circuit enforced the Board's underlying Order in the case at bar, and the Regional Director issued his compliance specification and notice of hearing. Respondent was represented by a different attorney during these proceedings, and Dixon testified that he did not want this attorney to see the settlement document, because they were his "private papers." During his deposition in the current proceeding against Respondent in Federal court, Dixon was asked whether he ever told the Region about this award. He replied, "Maybe I didn't," and at the instant hearing said, "Nothing's certain."

3. Testimony of Compliance Officer Annie Archie

a. Testimony concerning L. C. Gray

Compliance Officer Annie Archie became involved in this case some time in 1997. On direct examination, by Respondent she testified that the Region had no evidence that L. C. Gray made a search for work after mid-1997. On examination by counsel for the General Counsel, Archie stated that Gray "actually gave (her) places where he had searched for work." Archie relied on statements made to her by the discriminatees that "the Union" had signed the unemployment compensation books to verify that they had searched for work. According to Archie, the discriminatees told her that business manager Partin or his secretary had signed these books. Archie relied on the fact that the discriminatees had been deemed eligible for unemployment insurance benefits. "Also sufficient for the Board is that they have qualified for unemployment compensation benefits and without any other inquiry we can accept that they have drawn unemployment."

In addition, Archie relied on Gray's signing of the union out-of-work book, and the letter from Business Manager Partin stating that the discriminatees had been actively looking for work. The compliance officer also took into consideration the fact that Gray was over 60 years of age, had worked as a shipping clerk, did not have a driving license, and did not drive.

[14] The backpay specifications, the validity of which Respondent admits, show that Gray's backpay ended early in the second quarter of 1998. G.C. Exh. 1(e), app. B.

[15] "9/96—Cintas," "10/96—U Hall," "11/96—Lottery," "(illegible)," "3/97—City Parish," "4/97—Waste Management," "5/97—BFI," "6/97—Airborne Express," "7/97 Banner Produce," "8/97—Hackbarth Del.," "9/97—Began work at Hackbarth." G.C. Exh. 6.

[16] G.C.. Exh. 13, p. 41.

[17] R. Exh. 8., pars. 5 and 7.

b. Testimony concerning Riley Dixon

With respect to Dixon, Archie considered a list of places where he said he had attempted to find employment, had signed the union out-of-work book, and had submitted his unemployment compensation book.

C. Factual and Legal Conclusions

1. Applicable principles

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941), the Supreme Court stated that in fashioning an appropriate backpay order, the Board "may give appropriate weight to a clearly unjustifiable refusal (by the discriminatee) to take desirable new employment not so much (for) the minimization of damages as the healthy policy of promoting production and employment." "It has been accepted by the Board and reviewing courts that a discriminatee is not entitled to backpay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 fn. 3 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). "Once the General Counsel has established the gross amount of backpay due the discriminatee, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee, or which would mitigate that liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). "In order to be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position (which he was discriminatorily deprived of) and is suitable to a person of his background and experience." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). "[T]he principle of mitigation of damages does not require success; it only requires an honest good faith effort" *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955).

2. L. C. Gray

Gray was discharged on December 29, 1995, and claimed to have sought work from an employer (for the first time), about 6 months later, in mid-1996. Gray asserted that he sought work at 4 employers, the last in early 1977 (a lawyer's office, or a doctor's office). Since the total elapsed time between Gray's discharge and his reinstatement was about 2-1/4 years, his alleged search for work comprised less than one-fourth of that period.

The local newspaper contained ads soliciting employment applications in jobs for which Gray was qualified. Although he read some of these ads, he did not make any calls.

Gray obtained unemployment insurance benefits. He was required to submit, each week, the name of an employer where he sought work, or a union official's signature. To authenticate his claim, Gray submitted 16 signatures on his unemployment book for the first 25 weeks of 1996, and none thereafter. Gray himself signed two of the names. Although Union Business Manager Partin signed two of them, he did not sign one which was purportedly his. The remaining names are unidentified. It was on the basis of this deficient list of names that Gray based his claim for unemployment insurance benefits.

In *Southern Silk Mills, Inc.*, 116 NLRB 769, 770 (1956), the Board stated: "[W]e shall no longer give conclusive weight to registration with such (employment) agencies in determining the issue of reasonable search, but shall treat such registration as a factor to be given greater or less weight depending upon all the circumstances."

In *NLRB v. Seligman & Associates,*, 808 F.2d 1155 (6th Cir. 1986), enfg. in part and denying and remanding in part 273 NLRB 1216 (1984), the discriminatees were a couple who managed an apartment complex. As in the case at bar, the employer in *Seligman* introduced photostatic copies of microfilms of a local newspaper showing numerous ads soliciting applications from qualified applicants, i.e., caretaker couples. One of the discriminatees, in testimony quoted by the court, stated that she and her husband "didn't want to get involved in that" (808 F.2d at 1167). Although the court acknowledged that the caretaker couple sought other jobs, it stated that the discriminatees had "willfully failed to seek other comparable employment in mitigation of their losses" (id at 1168). The court remanded the issue of backpay to the Board, and left open the issue of how long the discriminatees could have waited after receiving an invalid offer of employment which the employer had made to them. On remand, the Board concluded that 6 weeks of free rent which the discriminatees had received constituted sufficient backpay, and found that no further backpay was due. *Seligman & Associates*, 290 NLRB 676 (1988). In the case at bar, Gray, like the discriminatees in *Seligman*, read ads advertising jobs for which he qualified, but did not apply.

In February 1996, Gray's wife became impaired following a stroke, and Gray became her principal caretaker. On July 3, 1996, he applied for and later received Social Security retirement benefits. In *Continental Insurance Co.*, 289 NLRB 579, 580 (1988), the Board stated that the discriminatee's acceptance of retirement benefits, together with other factors, showed that he effectively removed himself from the job market. Although he visited employment agencies, and made some attempts to find employment, the Board concluded that he "would only have accepted work when he chose and as he pleased." (Id.) Accordingly, the Board found that he was ineligible for backpay.

On the basis of Gray's delay in seeking interim employment and in signing the Union's out-of-work book, the short period in which he even claimed to be seeking work, the undocumented nature of this alleged search, his failure to seek jobs which were advertised in the newspaper, and his receipt of retirement benefits, I conclude that he willfully failed to make reasonable efforts to obtain interim employment. Accordingly, he is not entitled to backpay.

3. Ripley Dixon

Dixon submitted a written statement to the Board and gave testimony on two occasions regarding his alleged search for work. These submissions are contradictory, as set forth above, and include Dixon' assertion of a loss of memory on occasion. Although he was discharged on December 29, 1995, his first asserted attempt to get a job was about 9 months later, in September 1996.

Dixon signed the union out-of-work book in early 1996, and again in May 1996, but these signings do not constitute a search for work. He applied for and received unemployment insurance benefits, but the union official's signatures, authenticating to the state agency that he was seeking work, ended in June 1996 at a time when he was still unemployed.

Although Dixon had worked in various jobs for Respondent, he searched only for a job as a driver. Although solicitations for applications from drivers appeared in *The Advocate*, and Dixon read the classified section, there is no evidence that he

called any of these ads. One of them appeared a week after his discharge, on January 7, 1996.[18]

Dixon was injured on the job in 1993 or 1994, and received worker's benefits in the amount of $15,000, while Respondent paid medical bills of $36,000. After Dixon was discharged in December 1995, he resurrected the claim based on his injury, and alleged that he suffered from temporary or permanent total disability, or permanent partial disability. However, Dixon also testified that, subsequent to his injury, he was fully capable of functioning, and could unload deliveries of 500 reams of paper. Needless to say, these assertions are inconsistent.

Based on Dixon's admitted delay in seeking employment, the early termination of his union authentications, his failure to call newspaper ads for the very job he claimed to be seeking, and his unreliability as a witness, I find that he did not make a diligent search for work.

Finally, there is the issue as to whether Dixon is entitled to any backpay for the difference, if any, between the salary which he received from Hackbarth Delivery Service beginning in August 1997, and the salary which he was receiving from Respondent. The compliance specification asserts interim earnings beginning in the third quarter of 1997 and extending to the second quarter of 1998, when Dixon was reinstated. The amount of the interim earnings is less than the amount of gross backpay, and the difference is said to be owed by Respondent to Dixon.[19]

The difficulty with this argument is that Dixon was required to seek a job "substantially equivalent" to the one that he held with Respondent. According to the compliance specification, Dixon was making at Hackbarth less than one-half the amount he was earning with Respondent during the fourth quarter of 1997, and a little more than half in the next quarter. At the same time, driver ads appeared in the newspaper, and there is no evidence that Dixon called to find out the amount of wages they paid. I conclude that his job with Hackbarth was not substantially equivalent to his job with Respondent. Accordingly, he is not entitled to any backpay.

On these findings of fact and conclusions of law and on the entire record, and my careful consideration of the opinions of the compliance officer, I conclude that neither Gray nor Dixon is entitled to any backpay. Accordingly, the compliance specification is dismissed.

[18] R. Exh. 3.

[19] G.C. Exh. 1(e), app. D.